

**UNITED STATES DISTRICT COURT  
FOR THE  
NORTHERN DISTRICT OF TEXAS  
Fort Worth Division**

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COMMODITY FUTURES  
TRADING COMMISSION,  
1155 21st Street, N.W.  
Washington, D.C. 20581

Plaintiff,

v.

JAMES SPENCER BROWN  
2329 Mistletoe Dr.  
Fort Worth, Texas 76110

Defendant.

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: **CIVIL ACTION NO. 401-CV-0250-A**  
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: COMPLAINT FOR A  
: PERMANENT INJUNCTION  
: AND OTHER EQUITABLE  
: RELIEF AND FOR A  
: CIVIL MONETARY PENALTY  
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**I. SUMMARY**

1. On September 3, 1996, the Commodity Futures Trading Commission issued an Order directing Defendant, among other things, to cease and desist from (a) violating Section 4m(1) of the Commodity Exchange Act (7 U.S.C. § 6m(1)) by acting as a commodity trading advisor (“CTA”) without being registered as such; (b) violating Commission Regulation 4.41(b) (17 C.F.R. § 4.41(b)) by presenting the performance of commodity interest accounts based on simulated or hypothetical trading results without including a cautionary statement indicating the limitations of simulated or hypothetical trading results; (c) violating Commission Regulation

4.31 (17 C.F.R. § 4.31) by failing to provide a CTA Disclosure Document to prospective clients prior to the time of soliciting such prospective clients or entering into a CTA agreement with such prospective clients; and (d) violating Commission Regulation 4.36(d) (17 C.F.R. § 4.36(d)) by failing to file with the Commission the CTA Disclosure Document at least 21 days prior to providing the document to any prospective client. *In the Matter of J. Spencer Brown, Order Instituting Proceedings Pursuant To Sections 6(c) and 6(d) Of The Commodity Exchange Act and Findings and Order Imposing Remedial Sanctions*, CFTC Docket No. 96-8 (September 3, 1996) ("September 3, 1996 Order" or "Order").

2. From on or about December 1996 to April 1999, despite having consented to the entry of the Commission's September 3, 1996 Order, Defendant violated all of the provisions of that Order. That is, he acted as a CTA by directing the trading of commodity interest accounts without being registered as a CTA. Defendant also presented the purported performance of his commodity interest trading program, based on simulated or hypothetical trading results, without including a cautionary statement indicating the limitations of simulated or hypothetical trading results. Defendant also failed to provide prospective clients, including the persons who became clients and in whose accounts he directed the trading, with the required CTA Disclosure Document, and also failed to file the Disclosure Document with the Commission. In addition, from on or about December 1996 to April 1999, Defendant, while acting as a CTA, misrepresented his trading record, representing to prospective clients that he had been profitably trading for his clients, when, in fact, he had lost money trading for his clients.
3. Accordingly, pursuant to Section 6c of the Commodity Exchange Act, as amended by the Commodity Futures Modernization Act of 2000, Appendix \_\_\_\_ of Pub. L. No. 106-554

("Act"), 7. U.S.C. § 13a-1 (1994), the Commission brings this action to enjoin the Defendant's unlawful acts and practices and to compel his compliance with the Act, the Regulations and the September 3, 1996 Order. In addition, the Commission seeks a civil monetary penalty and such other equitable relief as this Court may deem necessary or appropriate, including disgorgement of defendant's ill-gotten gains and restitution to clients for damages proximately caused by defendant's violations.

## **II. JURISDICTION AND VENUE**

4. This Court has jurisdiction over this action pursuant to Section 6c of the Act, 7 U.S.C. § 13a-1, which provides that whenever it shall appear to the Commission that any person has engaged, is engaging, or is about to engage in any act or practice constituting a violation of any provision of the Act or any rule, regulation, or order promulgated thereunder, the Commission may bring an action in the proper District Court of the United States against such person to enjoin such practice, or to enforce compliance with the Act, or any rule, regulation or order thereunder.
5. Venue properly lies with this Court pursuant to Section 6c(e) of the Act, 7 U.S.C. § 13a-1(e), because the Defendant is found in, inhabits, or transacts business in the Northern District of Texas, Fort Worth Division, and the acts and practices in violation of the Act have occurred within this District and Division, among other places.
6. Unless restrained and enjoined by this Court, the Defendant is likely to engage in the acts and practices alleged in this Complaint or in similar acts and practices, as described more fully below.

## **III. THE PARTIES**

7. Plaintiff Commodity Futures Trading Commission is the independent federal regulatory agency charged with the administration and enforcement of the Act, 7 U.S.C. §§ 1 *et seq.* (1994), and the regulations promulgated thereunder, 17 C.F.R. §§ 1.1-190.10 (2000). The Commission is located at 1155 21st Street, NW, Washington, DC 20581.
8. Defendant James Spencer Brown is an individual who resides at 2329 Mistletoe Drive, Fort Worth, Texas 76110. He has never been registered with the Commission in any capacity.

#### **IV. FACTUAL BACKGROUND**

##### **The Commission's Cease and Desist Order of September 3, 1996**

9. From at least July 22, 1996 until August 6, 1996, defendant solicited the general public over the Internet to open commodity futures trading accounts to be directed by defendant pursuant to a computer trading program called ProTrade. Although this trading program had been recently developed, defendant advertised 13 years of performance results for the trading program without indicating the limitations of simulated or hypothetical trading.
10. Defendant solicited prospective clients to open accounts to be directed by him, and was prepared to enter into agreements with prospective clients to direct their trading accounts without delivering a Disclosure Document to his prospective clients or filing a Disclosure Document with the Commission.
11. By virtue of the activities described in paragraphs 9 and 10, above, the Commission entered an order by consent on September 3, 1996 finding that defendant had (a) been acting as a CTA without being registered as such, in violation of Section 4m(1) of the Act 7 U.S.C. § 6m(1); (b) represented hypothetical trading results on the Internet that were not accompanied

by either of the cautionary statements required by Section 4.41(b) of the Commission's Regulations, 17 C.F.R. § 4.41(b), in violation of Section 4.41(b) of the Regulations, 17 C.F.R. § 4.41(b); (c) failed to deliver to his prospective clients a Disclosure Document, in violation of Section 4.31 of the Regulations, 17 C.F.R. § 4.31; and (d) failed to file a Disclosure Document with the Commission at least 21 days prior to his solicitation of prospective clients or his entering into agreements with prospective clients to direct their commodity futures trading account, in violation of Section 4.36(d) of the Regulations, 17 C.F.R. § 4.36(d).

12. The September 3, 1996 Order required defendant to cease and desist from violating Section 4m(1) of the Act, 7 U.S.C. § 6m(1), and Sections 4.31, 4.36(d), and 4.41(b) of the Regulations, 17 C.F.R. §§ 4.31, 4.36(d), and 4.41(b).

**Defendant's Activities After the Issuance of the September 3, 1996 Order**

13. From on or about December 1996, to April 1999, Defendant solicited prospective clients to open commodity futures trading accounts for him to manage and managed at least 18 accounts. Under Defendant's direction, these accounts lost a total of at least \$172,240 and Defendant received at least \$15,982 from his clients for directing the commodity futures trading in those accounts.
14. From in or about December 1996, to June 1998, defendant represented to prospective clients that his commodity futures trading had made profits for his clients, when in fact the trading he directed in each of six client's accounts he had previously traded, as well as two of his own accounts, lost money. Defendant did not disclose these actual trading results to prospective clients.

15. On or about January 21, 1997, Brown sent a letter to one or more prospective clients claiming that his trading program had consistently produced returns on investment with an annual average in excess of 325%. Although this purported rate of return was based on hypothetical, rather than actual, trading results, Defendant did not indicate that this purported rate of return was based on hypothetical trading results.
16. At no time did Defendant deliver a Disclosure Document to his prospective clients nor did he file one with the Commission.
17. Defendant also did not disclose to prospective clients the material fact that the Commission had issued the September 3, 1996 Order against him.

**V. VIOLATIONS OF THE COMMODITY EXCHANGE ACT**

**COUNT I**

**VIOLATION OF SECTION 4b(a)(i) and (iii) OF THE ACT, 7 U.S.C. § 6b(a)(i) and (iii):  
FRAUD IN CONNECTION WITH COMMODITY FUTURES CONTRACTS**

18. Paragraphs 1 through 17 are realleged and incorporated herein by reference.
19. Section 4b(a)(i) and (iii) of the Act, 7 U.S.C. § 6b(a)(i) and (iii), makes it unlawful for any person to cheat or defraud or attempt to cheat or defraud another person; or willfully to deceive or attempt to deceive such other person by any means whatsoever in regard to any order or contract or the disposition or execution of any such order or contract, or in regard to any act of agency performed with respect to such order or contract for such person, in or in connection with any order to make, or the making of, any contract of sale of any commodity for future delivery, made, or to be made, for or on behalf of any other person if such contract for future delivery is or may be used for (A) hedging any transaction in interstate commerce

in such commodity or the products or byproducts thereof, or (B) determining the price basis of any transaction in interstate commerce in such commodity, or (C) delivering any such commodity sold, shipped, or received in interstate commerce for the fulfillment thereof.

20. By virtue of the conduct described in paragraphs 1 and 2 and 9 through 17 above, Defendant cheated or defrauded or attempted to cheat or defraud such other persons, and willfully deceived or attempted to deceive clients and prospective clients, in violation of Section 4b(a)(i) and (iii) of the Act, 7 U.S.C. § 6b(a)(i) and (iii).

## **COUNT II**

### **VIOLATION OF SECTION 4q(1) OF THE ACT, 7 U.S.C. § 6q(1) AND COMMISSION REGULATION 4.41(a), 17 C.F.R. § 4.41(a) FRAUD BY A COMMODITY TRADING ADVISOR**

21. Paragraphs 1 through 20 are realleged and incorporated herein by reference.
22. Section 1a(6) of the Act, 7 U.S.C. § 1a(6) defines a CTA as any person who, *inter alia*, for compensation or profit, engages in the business of advising others, either directly or through publications, writings, or electronic media, as to the value of or the advisability of trading in any contract of sale of a commodity for future delivery made or to be made on or subject to the rules of a contract market.
23. Section 4q(1) of the Act, 7 U.S.C. § 6q(1), makes it unlawful for a CTA, by use of the mails or any means or instrumentality of interstate commerce, directly or indirectly – (A) to employ any device, scheme, or artifice to defraud any client or participant or prospective client or participant; or (B) to engage in any transaction, practice, or course of business which operates as a fraud or deceit upon any client or prospective client.

24. Commission Regulation 4.41(a), 17 C.F.R. § 4.41(a), makes it unlawful for a CTA, or any principal thereof, to advertise in a manner which: (1) employs any device, scheme or artifice to defraud any client or prospective client; or (2) involves any transaction, practice or course of business which operates as a fraud or deceit upon any client or any prospective client.
25. By virtue of the conduct described in paragraphs 1 and 2 and 9 through 17 above, Defendant, while acting as a CTA, by using the mails or other means or instrumentalities of interstate commerce, employed devices, schemes or artifices to defraud clients or prospective clients and engaged in transactions, practices or courses of business which operated as a fraud or deceit upon clients or prospective clients, in violation of section 4o(1) of the Act, 7 U.S.C. § 6o(1).
26. By virtue of the conduct described in paragraphs 9 through 17 above, Defendant while acting as a CTA, included fraudulent representations in his advertising and promotional material, in violation of section 4.41(a) of the Commission's Regulations, 17 C.F.R. § 4.41(a).

### **COUNT III**

#### **VIOLATION OF COMMISSION REGULATIONS 4.41(b), 17 C.F.R. § 4.41(b)** **FAILURE TO PROVIDE CAUTIONARY STATEMENT REGARDING LIMITATIONS** **OF HYPOTHETICAL TRADING RESULTS**

27. Paragraphs 1 through 26 are realleged and incorporated herein by reference.



28. Regulation 4.41(b), 17 C.F.R. § 4.41(b), makes it unlawful for any person to present the performance of any simulated or hypothetical commodity interest account, transaction in a commodity interest or series of transactions in a commodity interest of a commodity pool operator, CTA, or any principal thereof, unless such performance is accompanied by a prescribed cautionary statement concerning the limitations of simulated or hypothetical trading results.
29. By virtue of the conduct described in paragraphs 1 and 2 and 9 through 17 above, Defendant, while acting as a CTA, presented the performance of simulated and hypothetical commodity interest accounts without including the required cautionary statement, in violation of Section 4.41(b) of the Regulations, 17 C.F.R. § 4.41(b).

#### **COUNT IV**

#### **VIOLATION OF SECTION 4m(1) OF THE ACT, 7 U.S.C. § 6m(1) ACTING AS AN UNREGISTERED COMMODITY TRADING ADVISOR**

30. The allegations of paragraphs 1 through 29 are realleged and incorporated herein by reference.
31. Section 4m(1) of the Act, 7 U.S.C. § 6m(1), provides in relevant part that it shall be unlawful for any CTA, unless registered under the Act, to make use of the mails or any means or instrumentality of interstate commerce in connection with his business as such CTA.
32. By virtue of the conduct described in paragraphs 1 and 2 and 9 through 17 above, Defendant, without being registered with the Commission in any capacity, engaged in activities as a CTA and made use of the mails or other means or instrumentalities of interstate commerce in

connection with his business as a CTA, in violation of Section 4m(1) of the Act, 7 U.S.C. § 6m(1).

**COUNT V**

**VIOLATION OF REGULATION 4.31, 17 C.F.R. § 4.31:**  
**FAILURE TO DELIVER REQUIRED DISCLOSURE DOCUMENT**  
**TO PROSPECTIVE CLIENTS**

33. The allegations contained in paragraphs 1 through 32 are realleged and incorporated herein by reference.

34. Section 4.31 of the Commission Regulations, 17 C.F.R. § 4.31, provides, in relevant part, that no CTA registered or required to be registered under the Act may solicit a prospective client, or enter into an agreement with a prospective client to direct the client's commodity interest account or to guide the client's commodity interest trading by means of a systematic program that recommends specific transactions, unless the CTA, at or before the time it engages in the solicitation or enters into the agreement (whichever is earlier), delivers or causes to be delivered to the prospective client a Disclosure Document for the trading program pursuant to which the trading advisor seeks to direct the client's account or to guide the client's trading, containing the information specified in Commission Regulations 4.34 and 4.35, 17 C.F.R. §§ 4.34 and 4.35 (2000).

35. By virtue of the conduct described in paragraphs 1 and 2 and 9 through 17 above, Defendant solicited prospective clients, and entered into agreements with prospective clients to direct the clients' commodity interest accounts without having first delivered to those prospective clients a Disclosure Document for the trading program containing the information specified

in Commission regulations 4.34 and 4.35, 17 C.F.R. §§ 4.34 and 4.35, in violation of section 4.31 of the Commission Regulations, 17 C.F.R. § 4.31.

### **COUNT VI**

#### **VIOLATION OF REGULATION 4.36(d), 17 C.F.R. § 4.36(d)** **FAILURE TO FILE DISCLOSURE DOCUMENT WITH THE COMMISSION**

36. The allegations contained in paragraphs 1 through 35 are realleged and incorporated herein by reference.
37. Section 4.36(d) of the Regulations, 17 C.F.R. § 4.36(d), provides that a CTA "must file with the Commission two copies of the Disclosure Document for each trading program that it offers or that it intends to offer not less than 21 calendar days prior to the date the trading advisor first intends to deliver the Document to a prospective client in the trading program."
38. By virtue of the conduct described in paragraphs 1 and 2 and 9 through 17 above, Defendant was required to, but failed to, file a Disclosure Document for the trading program containing the information specified in Commission Regulations 4.34 and 4.35, 17 C.F.R. §§ 4.34 and 4.35, with the Commission at least 21 days prior to the date the trading advisor first intended to deliver the Disclosure Document to a prospective client in the trading program, in violation of section 4.36(d) of the Regulations, 17 C.F.R. § 4.36(d).

### **COUNT VII**

#### **VIOLATION OF THE COMMISSION'S ORDER OF SEPTEMBER 3, 1996**

39. The allegations contained in paragraphs 1 through 38 are realleged and incorporated herein by reference.
40. On September 3, 1996, the Commission issued an Order directing J. Spencer Brown to:

cease and desist from violating Section 4m(1) of the Act, 7 U.S.C. § 6m(1) (1994); and . . . cease and desist from violating Sections 4.31, 4.36(d), and 4.41(b) of the Regulations, 17 C.F.R. §§ 4.31, 4.36(d), and 4.41(b) (1995).

*September 3, 1996 Order*

41. By virtue of the conduct described in paragraphs 1 and 2 and 9 through 17 above, Defendant has engaged in acts and practices in violation of the Commission's *September 3, 1996 Order*, an order issued under to the Act.

**RELIEF REQUESTED**

WHEREFORE, the Commission respectfully requests that this Court, as authorized by Section 6c of the Act, 7 U.S.C. § 13a-1, and pursuant to its own equitable powers enter:

- a) a permanent injunction prohibiting the Defendant from engaging in conduct violative of Sections 4b(a)(i) and (iii), 4m(1), and 4o(1) of the Act, 7 U.S.C. §§ 6b(a)(i) and (iii), 6m(1), and 6o(1), and Commission Regulations 4.31, 4.36(d) and 4.41(a and b), 17 C.F.R. §§ 4.31, 4.36 and 4.41(a and b), and the Commission's September 3, 1996 Order;
- b) an order directing the Defendant to disgorge all benefits received from the acts or practices which constitute violations of the Act or Regulations, as described herein, and interest thereon from the date of such violations;
- c) an order directing the Defendant to make full restitution to every client whose funds were lost as a result of acts and practices which constituted violations of the Act and Regulations, described herein, and interest thereon from the date of such violations;
- d) an order directing the Defendant to pay a civil monetary penalty in the amount of not more than the higher of \$110,000 (or \$100,000 for violations committed on or before November 27, 1996) or triple the monetary gain to the Defendant for each violation of the Act or Regulations; and

- e) such other and further remedial ancillary relief as the Court may deem appropriate.

Respectfully submitted,

Local Counsel

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United States Attorney

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